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No. 697

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

LEON CHARLES WEISS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

REPLY BRIEF OF PETITIONER TO THE BRIEF FOR THE UNITED STATES IN OPPOSITION.

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HAUSER PRINTING CO., INC., NEW ORLEANS

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May It Please the Court:

The writers of the government's brief in opposition are pleased on page 4 thereof to refer to the first contention of petitioner as "somewhat obscure." Our point may direct itself to a fundamental of justice perhaps

lost sight of in the labyrinth of long trial, but it should not be obscure to a mind intent on fair process of trial in the constitutional sense, rather than merely on the achievement of an instant conviction.

Our point is that no accused shall be tried on more than one accusation at a time; that our time-honored procedure demands a unanimous verdict by twelve jurors on a clear single issue of guilt or innocence upon each and every count of an indictment; and that this constitutional demand is not satisfied by the submission to the same jury and under the same count of an indictment of an alternative and separable double-issue of distinguishable facts, where some jurors might think the defendant guilty on one issue and other jurors on the other issue, but no twelve men might agree that defendant was guilty on any issue.

As we have endeavored at greater length to set forth in our original brief in support of our petition for a writ of review, such a mixed issue was the practical procedural effect of the trial of Leon Charles Weiss. He was accused of having done something in one year, and in the same count he was charged with doing something quite different in another year. The acts charged were different in their nature, they were performed with different people, proved by different evidence, they were dissimilar as alleged devices of fraud, there was an entire absence of proof of any continuity of conduct from incident to incident, and any person passing judgment upon defendant's conduct throughout might reasonably differ with other disinterested persons as to whether defendant acted with an improper motive on the first, or on the second occasion, or on any, or on both occasions.

Government counsel shelter themselves in this situation

of a fundamental violation of a serious constitutional procedural right by answering that this is a mail fraud case, and that a scheme to defraud may consist of component methods. They ignore the equal certainty that a general design to defraud on the part of a swindler, in connection with some long-continuing business transaction, may result in separated schemes and devices; and that whether an alleged accomplice, such as petitioner Weiss, had a guilty participation in one scheme or device, or in another scheme or device, may become a factual **alternative.** Absent **any** proof, as in this case, of a continuing guilty conduct from year to year and from separate incident to separate incident, on the part of the alleged accomplice, there is not only no legal warrant for trying him for both incidents under a single indictment count simultaneously, but to do so arbitrarily, as was done herein, gives each juror a double shot at him. In final analysis, each juror can find said defendant guilty on one crime **or** of another crime.

To give an exaggerated illustration, let us say that Hart, a contractor, was feuding with labor on this building; in 1936 he murdered workman A; in 1937 he murdered workman B; then Hart committed suicide. Weiss is charged with being an accessory, under very different conditions and by different methods, to each murder. He may have been an accessory to neither, either, or both. But to try him simultaneously for both homicides in such a way as to permit his jurors to find him guilty of one murder **or** the other murder would certainly shock the sense of justice of every criminal lawyer in the land.

Yet that is exactly what has been done in the case at bar. True, this is a mail fraud case, but is there any-

thing about the mail fraud statute which puts it beyond fundamentals of procedural justice?

The gist of a mail fraud violation is the use of the mails. But the use must be in furtherance of a fraudulent scheme or device, therefore the existence of a fraud is the essence of the offense. To plead a single mailing as in furtherance of two or more **separable** transactions alleged to be each independently fraudulent in character, particularly against an alleged accomplice to each transaction, affords every juror the plain alternative choice of finding the said accomplice guilty, in the alternative, of either one claimed fraud **or** the other claimed fraud. The Court, the counsel, the defendant himself, can never know what the jury determined he was guilty of.

Leon C. Weiss does not know today, his counsel do not know, the judge who tried him is unable to determine, whether under count 1 of his indictment the twelve jurors decided he was guilty of enlarging a contract price fraudulently (or, as he claimed, under authorization of the governor) in 1936; or whether those twelve jurors decided he was guilty of fraudulently (not inadvertently or negligently) approving Hart's final bill for extra work in 1937; or whether those twelve jurors disagreed between those two widely separated transactions, and twelve of them have never agreed that he was guilty of fraud in either transaction.

More than this, it actually happened that **all** the evidence **as to time** in the case, government proof, out of the mouth of the prosecution's witness, Seybold, demonstrated that the letter mentioned in Count 1 was mailed **between** the period of the first alleged fraudulent transaction in 1936 and the period of the second alleged fraudulent transaction in 1937. The letter antedated the second alleged fraudulent transaction (of the excessive extra

bill), yet the jury was instructed by the Trial Judge that the indictment charged a single scheme to defraud (see Vol. II, page 1158, of transcript, where Judge Dawkins very clearly impressed upon the jury that the indictment charged a single scheme to defraud by two methods, describing, firstly and secondly, those two methods, and then going on to repeatedly refer to the transaction as "one" or a "single" scheme, or in the singular).

It is true, as set out in footnote 5 at the bottom of page 5 of the brief in opposition, that government counsel attempt to recover from the adverse position their cause is placed in by the Trial Judge's description to the jury of the accusation, as being one of a single scheme to defraud, by urging that later (page 1167) the Trial Judge told the jury that "the scheme to defraud must have been conceived before any of these letters or documents were mailed...." This footnote to the brief in opposition then goes on to say: "It must be assumed, therefore, that the jury found that the scheme to defraud existed prior to the mailings alleged in Counts 1, 2 and 3, the only counts upon which petitioner was convicted." Of course such can be assumed. Let us analyse the situation: The Trial Judge told the jury that the whole affair, the transaction of May, 1936, as well as the transaction of May, 1937, was charged as one continuing scheme; he refers to it repeatedly in the singular; his attitude toward that issue before the jury, as it was in the entire case, was a tacit as well as express acceptance of the government's theory of a single continuing scheme. It was only routine for him to tell the jury the scheme must exist before the mailing; that statement does not detract from his more emphasized statements that the jury is dealing with only **one** scheme. The natural result is that (to deal with the mailing of March 3rd, 1937, in Count 1) every juror was bound to find, or at least likely to

find, that the one single scheme, so described by the Trial Judge as being charged by the indictment, originated in May, 1936, (certainly as far as Hart was concerned); that the scheme, therefore, must have been conceived (by the co-defendant Hart, at any rate) before Weiss' letter of March 3rd, 1937, was mailed; and in spite of the fact that a juror might not think that the alleged accomplice Weiss intended any fraud in the enlargement of the contract price in May, 1936, he might still conclude that Weiss was guilty of fraud in approving Hart's final bill for extras in May, 1937, and he would hold that the letter which Weiss mailed on March 3rd, 1937, **before the inflated bill for extras was even composed by Hart,** was in furtherance of the single continuing scheme described by the Trial Judge by methods "firstly" and "secondly", at the opening of the charge to the jury (Transcript, page 1158).

To put the very best possible face, from the prosecution's standpoint, on the matter of these instructions, it must be conceded that they were bound to have been highly confusing to lay jurors, involving, as the case did, two defendants, each with his own processes of thought bearing upon the question of personal intention toward fraud, and two independent and differing transactions a year apart, each claimed to have been fraudulent. We, therefore, point out that opposing counsel's resort, in the footnote at the bottom of page 5 of the brief in opposition, to the Trial Judge's routine reference to the legal necessity that the scheme to defraud must precede the mailing, does not, in the light of what the Trial Judge said in his whole charge about a single scheme (accomplished by two methods) being charged in the case, detract in the slightest from each juror's opportunity, **consistently with the whole charge,** to decide defendant's guilt **in the alternative,** that is to say, that he was guilty

of fraud in the transaction of May, 1936, or that he was guilty of fraud in the transaction of May, 1937.

Thus far, we have replied on this point to the brief in opposition, on the hypothesis that it is actually possible, under the authorities cited by the prosecution, to frame an indictment count on two different alleged methods of fraud (in a single scheme) as it was framed in the instant case. We have argued this phase of the debate out of a superabundance of caution only, because not a single authority cited by the brief in opposition, on page 5 thereof, fits the facts in hand. On pages 26, 27 and 28 of our brief in support of our petition for a certiorari, we have already demolished the argument made in the Circuit Court that those same authorities fitted this case. We have shown your Honors, and we repeat it, that each and every one of these cases relied on by the government is a case in which the indictment related to identical steps in the same fraud, and, incidentally, by the principal swindler, not an accomplice. In none of these cases would a juror reasonably have held that the accused might have been guilty of one incident, but not of another. The acts complained of were substantially inseparable links, like a metal chain, in the general fraud, as where a confidence man under the same blanket false representations sells individual shares of stock to a hundred victims. If he is false to one, he is false to all.

The difference that our opposition refuses to see, and the difference that the District Judge and Circuit Court failed to see, is that the jurors in the Weiss case were confronted with two differing, separable and distinguishable sets of facts, each relied on as fraud, and were virtually told in the instructions of the Trial Judge that it was all one scheme and that if there was any fraud, first or last, in that scheme, then any letter mailed

after the single scheme was conceived in furtherance thereof, was a crimnial act. Had this case involved two bogus stock sales of the same issue and under the same blanket representations, even though a year apart, a juror would logically answer that if one was a fraud, so was the other. But as long as there is available to a juror an alternative verdict of guilt, on two transactions sufficiently differing in character or history to afford reasonable room for men's minds to differ as to guilt or innocence between them, then by that extent is the accused unavoidably deprived of the unanimity of jury decision to which fundamental law entitled him.

Despite what government counsel say on page 6 of their brief in opposition we still think there is substantial conflict between the decision below and that of the Circuit Court of Appeals for the Second Circuit in *United States v. Buckner*, 108 F. (2d) 921. In the *Buckner* case, the Second Circuit Court pointed out the separable character of the two frauds ((1) the misuse of expense money and (2) the Philippine bonds manipulation), which the government attorneys had tried to treat as different methods in a single continuing fraud. In the case at bar, the courts below have refused to concede such a separable character of what they call two methods in a single fraudulent scheme. The issue is one of procedural doctrine or principle, and the holdings in the two cases are inconsistent.

II.

We have already very completely reviewed our second point, the admission in evidence of the $75,000.00 James Monroe Smith check, from pages 34 to 53 of our original brief in support of our petition for certiorari, and we will further impose upon the indulgence of your

Honors only to comment briefly on the second part of the brief in opposition.

There was absolutely no justification for the admission by the Trial Court of this check. It had no relation to the case on trial, or to any event in defendant's life even remotely related to a theory of "intent" or "system" evidence against him. His Honor, Judge Sibley, in the Circuit Court, unqualifiedly declared Weiss should have a new trial, because of the highly prejudicial use made of this check.

Now comes the brief in opposition and says (page 7): "But the evidence (of collateral matters) was adduced by the Government to show that petitioner did intend to enter into a scheme with Hart to accomplish the fraud charged. Manifestly, the existence of these other frauds, **in most of which Hart participated,** was relevant in determining the credibility of petitioner's defense that he was simply Hart's dupe" (Emphasis ours).

Let us emphasize that Hart had not the slightest relationship to the incident of the $75,000.00 check presented to Weiss by Smith.

More than that, as the true history of the check turned out, not even Weiss himself had any relationship to the proceeds thereof.

Rather than having received the sum of $75,000.00 from Smith, as argued to the jury by the prosecution, Smith had credited that money to his own daughter and himself on the books of Fenner & Beane; yet the defendant Weiss was deprived of the opportunity to prove to the jury such disposition of this large sum of money the District Attorney charged him in argument with getting.

But the brief in opposition quotes on pages 8 and

9 thereof from remarks in the transcript by Judge Dawkins to show that the $75,000.00 Smith check was admitted in evidence to prove "transactions in which Mr Weiss **in connection with Mr. Monte Hart** or this firm approved payments to be made to them, or fees that were paid to himself in connection with these matters" (emphasis ours) or "transactions as happened in the dealings in which **Caldwell Brothers and Hart were the contractors** and this defendant or his firm or architects which are of a similar nature" (emphasis ours).

Opposing counsel are here merely reaching for language to smoke-screen the issue, because the Smith $75,000.00 check never had, as we have already said, the slightest relationship to Monte Hart, or to Caldwell Brothers and Hart, or to any dealings by them. It was involved in a very brief incident exclusively between Smith and Weiss, unrelated to and unknown to Hart or his firm or its affairs, remote and dissimilar from anything else in the case.

Its admission was a judicial bungle made in the confusion and rush of the final night hours of a lengthly criminal trial; one that would not have occurred, we are sure, had the Trial Judge known the history of the check then as he learned it later; and one that he was reluctant to correct in the face of the burden of a re-trial, but which should be corrected in justice to the man whose liberty is at stake.

It is true, as said on page 9 of the brief in opposition, that a motion for a new trial is addressed to the discretion of the trial court; but that discretion is grossly abused when a trial court admits a highly prejudicial piece of unexpected evidence on a premise immediately thereafter found to be wholly false, and the

proof of which falsity was then beyond reach of the court and defendant, and when that trial court refuses to set the matter aright by a new trial.

It begs the question that the Trial Judge should say: "I think it is a collateral matter that is not of such importance to this case as to justify the Court in setting aside the verdict and granting a new trial" (as quoted on page 10 of the brief in opposition).

That such proof of apparent receipt by the defendant of an unjustified $75,000.00 from Smith was bound to have been of substantial prejudice against Weiss cannot be doubted. Elsewhere the trial judge said that anything connecting Weiss with Smith, later a known convict, was bound to prejudice Weiss (Transcript, page 640). If the evidence prejudiced Weiss, it does not afterwards lie in the mouth of the Trial Judge to say whether or not, in his opinion, it might have been the straw of proof which finally cracked the camel's back of an adverse verdict. In ultimate analysis the submission of that $75,000.00 check to the scrutiny of the jurors had nothing to do with the case in chief, was not fair evidence of system or intent, was substantially prejudicial, and deprived Weiss of a fair trial. The argument made from pages 6 to 10 of the brief in opposition that this check was properly admitted as intent evidence, because it related to a matter in which "Hart participated" (page 7), or a matter "in connection with Mr. Monte Hart or this firm" (page 8), or a matter "in the dealings in which Caldwell Brothers and Hart were the contractors" (page 8), is an argument fabricated out of unsuited words and quotations, an argument made for lack of a meritorious one.

Reiterating our prayer for the granting of a writ of certiorari to review the final judgment complained of,

Respectfully submitted,

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